IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 92-2062D/A
	)	
STATE OF TENNESSEE, ET AL.,	)	
	)	
Defendants,	)	
	)	
PEOPLE FIRST OF TENNESSEE, PARENT GUARDIAN ASSOCIATION OF ARLINGTON DEV. CENTER,	)	
	)	
Intervenors.	)	

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO VACATE ALL OUTSTANDING INJUNCTIVE RELIEF AND TO DISMISS THE CASE

Charles J. Cooper
Michael W. Kirk
Brian S. Koukoutchos
Rachel Clark
COOPER & KIRK PLLC
1523 New Hampshire Avenue N.W.
Washington, DC 20036
Tel: 202-220-9600
Fax: 202-220-9601

Leo Maurice Bearman, Jr.
BAKER DONELSON BEARMAN CALDWELL & BERKOWITZ
165 Madison Avenue, Suite 2000
Memphis, TN 38103
Tel: 901-526-2000
Fax: 901-577-0717

Dianne Stamey Dycus
Deputy Attorney General
General Civil Division
P.O. Box 20207
Nashville, TN 37202
Tel: 615-741-6420
Fax: 615-532-5683

Jonathan P. Lakey
PIETRANGELO COOK
6410 Poplar Avenue, Suite 190
Memphis, TN 38119
Tel: 901-685-2662
Fax: 901-685-6122

September 3, 2008

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE....1

I. PROCEDURAL HISTORY....1

II. THE BURDENS IMPOSED BY THE REMEDIAL ORDERS....6

III. THE STATE'S PLANS GOING FORWARD....9

ARGUMENT....9

I. THE REMEDIAL ORDERS IN THIS CASE NO LONGER HAVE A BASIS IN FEDERAL LAW....10

II. A JUDGMENT CONTROLLING THE OPERATION OF A STATE PROGRAM SHOULD BE VACATED WHEN ITS BASIS IS UNDERMINED BY INTERVENING CLARIFICATION OF THE LAW. 16

CONCLUSION....20

TABLEOF AUTHORITIES

Cases **Page/s**

Agostini v. Felton, 521 U.S. 203 (1997) 17, 19
Baker v. Detroit, 2007 U.S. App. LEXIS 3885 (6th Cir. Feb. 16, 2007) 14
Brooks v. Giuliani, 84 F.3d 1454 (2d Cir. 1996) 12, 15
D.W. by M.J. v. Rogers, 113 F.3d 1214 (11th Cir. 1997) 12
DeShaney v. Winnebago County Dep't of Social Services, 489 U.S. 189 (1989) 11
Doe v. Briley, 511 F. Supp. 2d 904 (M.D. Tenn. 2007).....18, 20
Fialkowski v. Greenwich Home for Children, 921 F.2d 459 (3rd Cir. 1990).....11
Frew v. Hawkins, 540 U.S. 431 (2004).....17
Goodman v. Parwatikar, 570 F.2d 801 (8th Cir. 1978).....10
Higgs v. Latham, 1991 U.S. App. LEXIS 25549 (6th Cir. Oct. 24, 1991).....9, 13, 15
Jackson v. Schultz, 429 F.3d 586 (6th Cir. 2005) 14
Kennedy v. Schafer, 71 F.3d 292 (8th Cir. 1995) 12
Lanman v. Hinson, 529 F.3d 673 (6th Cir. 2008).....14, 15
Monahan v. Dorchester Counseling Ctr., 961 F.2d 987 (1st Cir. 1992) 10, 11, 15
Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992).....10, 16, 17
Society for Good Will to Retarded Children v. Cuomo, 737 F.2d 1239 (2nd Cir. 1984) ..10, 12, 15
Suffolk Parents of Handicapped Adult v. Wingate, 101 F.3d 818 (2d Cir. 1996).....12, 15
Sweeton v. Brown, 27 F.3d 1162 (6th Cir. 1994).....9, 17, 18
Torisky v. Schweiker, 446 F.3d 438 (3rd Cir. 2006).....11, 15
United States v. Tennessee, 925 F. Supp. 1292 (W.D. Tenn. 1995).....3, 10
United States v. Tennessee, 798 F. Supp. 483 (W.D. Tenn. 1992).....2
United States v. Williams, 15 F.3d 1356 (6th Cir. 1994).....13
Walton v. Alexander, 44 F.3d 1297 (5th Cir. 1995).....11, 15
Wilson v. Formigoni, 42 F.3d 1060 (7th Cir. 1994) 12
Wrenn v. Gould, 808 F.2d 493 (6th Cir. 1987).....13
Youngberg v. Romeo, 457 U.S. 307 (1982) 2, 10

Other

FED. R. APP. P. 32.1.....14
FED. R. CIV. P. 60(b) 17
Sixth Circuit Rule 28(e) (2008) 14

TENN. CODE ANN. § 33-5-101 2
TENN. CODE ANN. § 33-5-103 2
TENN. CODE ANN. § 33-5-303 ..... 2, 16
Tenn. Pub. Acts, pub. ch. 283, H.B. 659 2

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 92-2062D/A
	)	
STATE OF TENNESSEE, ET AL.,	)	
	)	
Defendants,	)	
	)	
PEOPLE FIRST OF TENNESSEE, PARENT GUARDIAN ASSOCIATION OF ARLINGTON DEV. CENTER,	)	
	)	
Intervenors.	)	

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO VACATE ALL OUTSTANDING INJUNCTIVE RELIEF AND TO DISMISS THE CASE

Defendants respectfully submit this Memorandum in support of their motion for an order (i) vacating all outstanding injunctive relief, and (ii) dismissing this case with prejudice.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

The United States brought this suit against Defendants (the "State") in 1992, asserting in relevant part that the State was violating the substantive due process rights of the residents of the Arlington Development Center ("ADC" or "Arlington"), a state-operated, residential mental retardation facility located in Arlington, Tennessee. Specifically, the United States contended that the Due Process Clause of the Fourteenth Amendment guaranteed ADC residents a substantive right to minimally adequate food, shelter, clothing, and medical care as provided in

the Supreme Court's decision in *Youngberg v. Romeo*, 457 U.S. 307 (1982). *See United States v. Tennessee*, 798 F. Supp. 483, 486 (W.D. Tenn. 1992). In *Youngberg*, the Supreme Court held that *involuntarily* committed persons have such rights. *See Youngberg*, 457 U.S. at 314.

Shortly after the complaint was filed, the State moved to dismiss, asserting that the substantive protections of the Fourteenth Amendment's Due Process Clause were not implicated in this case because virtually all Arlington residents were voluntarily admitted to ADC at the behest of their parents or guardians, rather than being involuntarily institutionalized by the State as in *Youngberg*. *See Tennessee*, 798 F. Supp. at 485. This Court denied the motion, holding that "it is reasonable to infer from the facts as alleged that there is sufficient state action in the process used to admit residents into the facility to trigger substantive due process rights under the Fourteenth Amendment." *Id.* at 487.[1]

Following a trial on the merits, liability was imposed against the State on the basis of the Court's 1993 findings that conditions at ADC did not meet the minimum constitutional standards established in *Youngberg*. *See* Opinion of the Court (Nov. 22, 1993), Tr. at 13-16, 25; *see also* Supplemental Findings of Fact (Feb. 17, 1994), at 4.[2] In 1995, the Court extended the finding of liability (and the relief awarded) to the plaintiff class represented by People First of Tennessee

[1] The Court also referenced a state statute that then provided that, once an individual is admitted to Arlington, he or she is under the "exclusive care, custody and control of the commissioner and superintendent," 798 F. Supp. at 487 (quoting TENN. CODE ANN. § 33-5-103), as well as a statute providing that the Superintendent of Arlington may deny a person's request for discharge, *id*., n.8 (citing TENN. CODE ANN. § 33-5-101(6)). In response to the Court's opinion, the General Assembly repealed TENN. CODE ANN. § 33-5-103, and amended TENN. CODE ANN. § 33-5-101 to make clear that the superintendent *must* discharge any individual who so requests (or whose parent or guardian so requests) within 12 hours after receipt of the request or at the time stated in the request, whichever is later. *See* Tenn. Pub. Acts, pub. ch. 283, H.B. 659, approved by the Governor, May 6, 1993. This remains Tennessee law today. *See* TENN. CODE ANN. § 33-5-303. Thus, it is beyond dispute that *no* resident of ADC is held there against his or her will, and all have an absolute right to leave any time they please.

[2] The State was also found liable for violation of the Federal Individuals with Disabilities Education Act for failing to provide required educational services to children at Arlington. *See* Opinion of the Court (Nov. 22, 1993), Tr. at 25-27; *see also* Supplemental Findings of Fact (Feb. 17, 1994), at 42-46. This provision is no longer relevant to the case because there are no children remaining at Arlington. *See* Declaration of Stephen H. Norris ("Norris Decl.") ¶ 2 (filed herewith).

("People First"), again based on the theory that conditions at ADC violated the substantive due process rights of the members of the plaintiff class. *See* Order Granting Motion to Enter Findings from 92-2062 in this Case and Granting Motion to Intervene in Civil Action No. 92-2062, entered in No. 92-2213 (Sept. 26, 1995), at 5-7.

The Court also granted certification of the *People First* class, and permitted the *People First* plaintiffs to intervene in the instant case. *See id.* The Court defined the class certified to include (i) those who have resided at Arlington at any time from December 12, 1989 to present; (ii) those who are residing at Arlington currently; and (iii) "all persons at risk of being placed at Arlington Development Center." Order Granting Class Certification, entered in No. 92-2213 (Sept. 26, 1995), at 5 & n.4, 23.

At the time of its liability holding, the Court entered a preliminary injunction against the State and ordered the State to submit a remedial plan after consultation with the United States. *See* Opinion of the Court (Nov. 22, 1993), Tr. at 46-47; *United States v. Tennessee*, 925 F. Supp. 1292, 1297 (W.D. Tenn. 1995). In September 1994, the parties submitted a stipulated Remedial Order, in which they agreed to the appointment of a Monitor to assist and oversee the State's compliance with the remedial plan. *See* Remedial Order, Doc. No. 338 (Sept. 2, 1994), at 47-50. The Remedial Order included an implementation schedule containing approximately 103 deadlines for more than 150 requirements. *See id.*; *Tennessee*, 925 F. Supp. at 1297.

In August 1997, the Court adopted, and ordered the State to comply with, a Community Plan consisting of "eight chapters and approximately 549 specific provisions of services and support to current and former ADC residents." Order on Community Plan for West Tennessee, Doc. No. 753 (Aug. 21, 1997), at 3. In order to ensure that the Plan provisions were implemented and that each class member received adequate care and support, the Court also

ordered the Monitor to undertake certain oversight activities with respect to the community placements. *See id.* at 8-9, 17. In particular, the Court ordered, among other things, that the Monitor must approve the transition plan for each ADC resident prior to the placement of that resident. *See id.* at 8, 17. The Court also modified the Community Plan "so that its benefits and protections extend to all members of the class in *People First*…." *Id.* at 6.

In August 1999, the Court entered another agreed order, imposing numerous additional requirements on the State. *See* Agreed Order, Doc. No. 1116 (Aug. 11, 1999). Pursuant to that Order, the State was required to file waiver applications with the federal government seeking partial federal funding of the health care services provided by the State to ADC class members pursuant to the Medicaid Act. During the development, approval, and implementation of these new proposed waivers, and prior to their implementation, the Order mandated that the State "provide, through payment of state dollars, the appropriate services not otherwise covered by the current 1115 or 1915c Waivers." *Id* at 2.

The Federal Government did not approve the waiver application. Instead, the Court directed that the health-related services to class members be provided with state funds under contract with a non-profit corporation, Community Services Network of West Tennessee ("CSN"), that was incorporated to fill this role. *See* Order, Doc. No. 1247 (Apr. 4, 2000) (appointing CSM board); Order, Doc. No. 1248 (Apr. 5, 2000) (ordering the State to legally execute a Grant Contract with CSN by April 14, 2000). Under the Grant Contract, the scope of services that CSN provides to class members is much broader than those services available to identically-situated mentally retarded individuals in Middle and East Tennessee. *See* Declaration of Stephen H. Norris ("Norris Decl.") ¶¶ 7-10 (filed herewith). In addition, the State must fund 100 percent of the great bulk of the services provided to class members under the CSN contract;

in contrast, the State receives federal funding of approximately 64 percent of the cost of such services when they are provided by TennCare and funded through the Medicaid State Plan or one of the Medicaid waiver programs. *See id*. at ¶¶ 9-10 (84 percent of cost of CSN services not subsidized by federal financial participation).

During the proceedings leading to the formation of CSN, the Court found that CSN would not be "an economically viable entity" if it served only those individuals who were or had been ADC residents. Order, Doc. No. 1219 (Mar. 10, 2000) at 2. The Court observed that only 140 to 170 people would be served by CSN if its coverage was so limited, whereas 800 to 1,200 people would be served if the class were expanded to include a broadly defined group of individuals who were deemed "at risk" of entering ADC. *Id*. Of course, by 2000, no one was truly "at risk" of entering ADC because the 1994 Remedial Order had "enjoined [the State] from admitting any additional residents to ADC except for emergency, short-term court-ordered admissions." Remedial Order, Doc. No. 338 (Sept. 2, 1994) at 42.

Nevertheless, the Court issued an Order in July 2000 interpreting the "at risk" portion of the plaintiff class as including all individuals in the geographic area served by ADC (i.e., West Tennessee) who have demonstrated medical needs sufficient to require institutional care in the absence of home and community based services. *See* Order Regarding Scope of "At Risk" Population, Doc. No. 1302 (July 17, 2000). After extensive proceedings concerning the scope of the class in both this Court and in the Sixth Circuit over the next six years, the parties entered the 2006 Settlement Agreement in May 2006, and the Court approved it in February 2007. *See* 2006 Settlement Agreement, Doc. No. 2085-2 (May 16, 2006); All-Party Consent Order to Motion to Approve 2006 Settlement Agreement, Doc. No. 2174 (Feb. 15, 2007). That agreement defined the "at risk" portion of the class as all persons who reside in West Tennessee; meet Medicaid

eligibility criteria for an Intermediate Care Facility for the Mentally Retarded ("ICF/MR"); and demonstrate a current need or desire for institutional placement by satisfying one of several criteria. *See* 2006 Settlement Agreement, Doc. No. 2085, at 12.

II. THE BURDENS IMPOSED BY THE REMEDIAL ORDERS

By any measure, the remedial orders entered by this Court over the past 14 years have been, and continue to be, extraordinarily burdensome. The State has spent, and continues to spend, enormous sums of money to carry out the obligations imposed by the Court's orders. Perhaps even worse, the effect of the Court's orders over the years has been to create two classes of mentally retarded citizens served by the State of Tennessee's programs: the members of the plaintiff class in this case (i.e., most mentally retarded citizens in West Tennessee), who enjoy the benefits conferred by the Court's orders; and the otherwise identically situated mentally retarded citizens in Middle and East Tennessee, who must make do on considerably less.

A non-exhaustive sampling of the disparate treatment of these two classes suffices to demonstrate that this Court's orders have effectively created a grossly inequitable system in which mentally retarded persons residing in West Tennessee are allocated State resources far in excess of those provided to mentally retarded persons residing in other parts of the state:

- Mentally retarded individuals in the Arlington class receive a court-ordered housing subsidy that identically situated mentally retarded individuals in the statewide waiver do not receive. In fiscal year 2007-2008, this subsidy cost the State $1,428,094. Norris Decl. ¶ 5.

- Mentally retarded individuals in the Arlington class receive a court-ordered transportation subsidy that identically situated mentally retarded individuals in the statewide waiver do not receive. In fiscal year 2007-2008, this subsidy cost the State $982,278. Norris Decl. ¶ 6.

- Mentally retarded individuals in the Arlington class receive dental benefits pursuant to court order, which identically situated mentally retarded persons in the statewide waiver do not receive. Norris Decl. ¶ 7.

- Mentally retarded individuals in the Arlington class receive vision benefits pursuant to court order, which identically situated mentally retarded persons in the statewide waiver do not receive. Norris Decl. ¶ 8.

- As noted above, most mentally retarded individuals in the Arlington class receive health care services through CSN, rather than through TennCare, unlike identically situated mentally retarded persons in the statewide waiver. Total expenditures on CSN have risen steadily from $9.3 million in fiscal year 2004-2005) to $11.4 million in fiscal year 2007-2008. Norris Decl. ¶¶ 9-10.

- Mentally retarded persons in the Arlington class receive advocacy services pursuant to court order, which identically situated mentally retarded individuals in the statewide waiver do not receive. For fiscal year 2007-2008, the estimated cost of advocacy services for Arlington class members is $342,742. Norris Decl. ¶ 11.

- Mentally retarded persons in the Arlington class receive appointed conservators/guardians at State expense unlike identically situated mentally retarded persons in the statewide waiver. The approximate cost for these services was $286,200 in fiscal year 2008-2009. Norris Decl. ¶ 12.

In *addition to* the above-listed costs (most, if not all, of which are incurred outside the Arlington Waiver), the State spends substantially more providing services to Arlington class members in the Arlington waiver than for identically situated mentally retarded individuals in the statewide waiver. The average waiver costs per day over the past several years are as follows:

Fiscal Year	Arlington Waiver	Statewide Waiver
2004-05	$436.73	$201.09
2005-06	$433.28	$203.73
2006-07	$436.16	$220.81
2007-08	$434.51	$226.44

Norris Decl. ¶ 13. In FY 2007-08, this cost differential totaled over $21.5 million. *Id.*

In sum, Deputy Commissioner Norris has concluded that, "[a]ll told, compliance with the Court's remedial orders in this case is costing the State of Tennessee upwards of $30 million per year over and above what the State would be spending if Arlington class members were treated the same way as otherwise identically situated mentally retarded persons who are served by the statewide waiver." Norris Decl. ¶ 14.

Apart from the tremendous financial burden and the fundamental inequity resulting from the remedial orders in this case, the sweeping powers exercised by the Court Monitor raise serious issues of governmental accountability. The Court Monitor currently employs, at State expense, a staff of approximately 10 people with offices in both New York and Tennessee. Over the past four years alone, the Court's orders have required the State to pay over $4.2 million in fees and expenses to the Court Monitor, and those costs have accelerated substantially in recent months – over the last quarter, these fees have exceeded $1.5 million on an annualized basis. Norris Decl. ¶ 3 & Exhibit 1. The Court Monitor has used these extensive resources over the years to exercise significant influence over State policy governing the services provided to mentally retarded individuals in West Tennessee.

And when the State has failed to defer to the Court Monitor's policy views, she has, on occasion, responded by resorting to the powers granted to her under the remedial orders entered in this case. Most recently, for example, the Court Monitor announced that she would not approve *any* transitions by ADC residents into community placements because she disagrees with limitations that the State has promulgated, with the approval of the Federal Government, on the provision of home health and private duty nursing services in the State's Medicaid program and she believes that the rates the State pays for nursing services in the MR waiver programs is too low. *See* Letter from Dr. Nancy K. Ray to the Court (Aug. 21, 2008) (attached as Exhibit A). Especially when one considers that the injunctive relief in this case was imposed to remedy conditions *within* ADC that the Court had found violated the Constitution, the Court's Monitor's refusal to permit any ADC residents to transition *from* ADC seems incongruous at best.[3]

[3] The State, of course, has the right to and may challenge the Monitor's across-the-board moratorium as it is applied to deny any particular requested transition from ADC into a community residence.

III. THE STATE'S PLANS GOING FORWARD

The Court's disposition of the instant motion will have no impact on the state's implementation of certain principal features of the Court's remedial orders. For, even if the Court grants the State's motion and vacates all outstanding injunctive relief, the State plans proceed with the closure of ADC. *See* Norris Decl. ¶ 15. The State also intends to proceed with its plans to build 12 ICF/MR homes in the community (with 4 beds each for a total of 48 beds) to accommodate some of the individuals transitioning out of ADC at a total estimated cost of over $11.5 million. *Id*. The State also intends to proceed with the plan to open a Resource Center for mentally retarded persons in West Tennessee. *Id*.

ARGUMENT

The law is now clear that individuals who have not been involuntarily committed to a state mental health facility have no substantive due process rights under the Fourteenth Amendment. Every Court of Appeals that has addressed the issue in a published opinion has now held that, in the absence of a state action involuntarily committing a patient to a state institution, there has been no deprivation of liberty to trigger the Due Process Clause. The Sixth Circuit has likewise held in an unpublished ruling that a mental health patient could not bring a claim for violation of the substantive due process rights recognized in *Youngberg*, because she had been voluntarily committed. *Higgs v. Latham*, No. 91-5273, 1991 U.S. App. LEXIS 25549, at *10-12 (6th Cir. Oct. 24, 1991).

It necessarily follows that the Remedial Order and all of the subsequent orders imposing relief against the State in this case must be vacated because none of the residents of ADC are held there involuntarily. Where "[t]he foundation upon which the claim for injunctive relief was built has crumbled," *Sweeton v. Brown*, 27 F.3d 1162, 1166 (6th Cir. 1994) (en banc),

prospective injunctive relief entered against a State in institutional reform litigation must be vacated. *See also Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 388 (1992) ("modification of a consent decree may be warranted when the statutory or decisional law has changed to make legal what the decree was designed to prevent"). In light of this change in circumstances, the Remedial Order and all of the subsequent orders imposing relief against the State are now enforcing supposed rights of substantive due process that do not exist.

I. THE REMEDIAL ORDERS IN THIS CASE NO LONGER HAVE A BASIS IN FEDERAL LAW.

Plaintiffs' claims and the relief ordered by this Court rest entirely on the proposition that, under the doctrine of substantive due process as explained in *Youngberg v. Romeo*, 457 U.S. 307 (1982), the State owes an affirmative, federal constitutional duty to ensure that residents of ADC receive minimally adequate food, shelter, clothing, and medical care while they are institutionalized. *See* Opinion of the Court (Nov. 22, 1993), Tr. at 13-16; *United States v. Tennessee*, 925 F. Supp. 1292, 1296 & n.3 (W.D. Tenn. 1995). At the time this Court found the State liable and first imposed relief, the law was unclear whether substantive due process rights under *Youngberg v. Romeo* extended to voluntarily admitted residents of state institutions, or was limited only to involuntarily committed individuals. At that time, the circuits were split on the issue. The Second and Eighth Circuits had held that *Youngberg*'s protections *do* apply to voluntary and involuntary residents alike. *See Society for Good Will to Retarded Children v. Cuomo*, 737 F.2d 1239, 1245-46 (2nd Cir. 1984); *Goodman v. Parwatikar*, 570 F.2d 801, 804 (8th Cir. 1978).

In contrast, the First and Third Circuits had held that, when patients are voluntarily admitted to a State facility, the State's constitutional duty to protect those it renders helpless by confinement is not triggered. *See Monahan v. Dorchester Counseling Ctr.*, 961 F.2d 987, 991

(1st Cir 1992) ("Because the state did not commit Monahan involuntarily, it did not take an 'affirmative act' of restraining his liberty, an act which may trigger a corresponding due process duty to assume a special responsibility for his protection."); *Fialkowski v. Greenwich Home for Children*, 921 F.2d 459, 465-66 (3rd Cir. 1990) (holding that " 'an affirmative constitutional duty to provide adequate protection' must be confined to cases in which a person is taken into state custody against his will").

Both of those courts rested their holdings on the Supreme Court's decision in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). *See Monahan*, 961 F.2d at 990-92; *Fialkowski*, 921 F.2d at 466. In *DeShaney*, the Court distinguished *Youngberg* and other cases finding an affirmative constitutional duty of care and protection as

> [S]tand[ing] only for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well being…. [I]t is the State's affirmative act of restraining the individual's freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

489 U.S. at 199-200.

The law has now been clarified, and the circuit split that existed in the early 1990s has been eliminated. Every court of appeals to address the issue in a published decision now holds that involuntary confinement is a *sine qua non* for a substantive due process claim under *Youngberg v. Romeo*. *See, e.g., Torisky v. Schweiker*, 446 F.3d 438, 446 (3rd Cir. 2006) ("Thus a custodial relationship created merely by an individual's voluntary submission to state custody is not a 'deprivation of liberty' sufficient to trigger the protections of *Youngberg*."); *Walton v. Alexander*, 44 F.3d 1297, 1304 (5th Cir. 1995) (*en banc*) ("if the person claiming the right of state protection is *voluntarily* within the care or custody of a state agency, he has no substantive

due process right to the state's protection of harm inflicted by third party non-state actors"); *id*. at 1305 ("In short, this 'special relationship' does not arise solely because the state exercises custodial control over an individual when a person *voluntarily resides* in a state facility under its custodial rules.") (original emphasis); *Wilson v. Formigoni*, 42 F.3d 1060, 1067 (7th Cir. 1994) (plaintiff "does not complain that she was held at [a state mental health facility] against her will, and thus cannot maintain that the state did not do enough to ensure her safety while she was committed there"); *see also D.W. by M.J. v. Rogers*, 113 F.3d 1214, 1217-19 (11th Cir. 1997) (substantive due process rights not triggered by commitment order alone, but only physical deprivation of liberty pursuant to commitment order).

Furthermore, both Circuits that had previously extended *Youngberg* substantive due process rights to voluntarily admitted residents of state mental health institutions have since retreated from that position. The Second Circuit has repudiated its holding in *Society for Good Will to Retarded Children v. Cuomo* and conformed its law to the now-prevailing rule: "the reach of *Society for Good Will* is controlled by the Supreme Court's subsequent holding in *DeShaney*" and affirmative duties under the Due Process Clause therefore arise only when the plaintiff's commitment is "involuntary." *Brooks v. Giuliani*, 84 F.3d 1454, 1466 (2d Cir. 1996); *see also Suffolk Parents of Handicapped Adult v. Wingate*, 101 F.3d 818, 822-24 (2d Cir. 1996) (vacating preliminary injunction entered on the basis of *Youngberg* and *Society for Good Will* because plaintiffs had been voluntarily admitted to the state institution as children and there was no basis in record for claim that they could not leave upon request). Similarly, the Eighth Circuit has noted the uniform direction of subsequent appellate decisions and cast doubt on its earlier decision in *Goodman v. Parwatikar*. *See Kennedy v. Schafer*, 71 F.3d 292, 294 (8th Cir. 1995) ("[I]t [is] impossible for us to say that the law was clearly established at that time in favor of the

existence of a due-process right on the part of a voluntarily admitted patient.… We need not and do not decide whether *Parwatikar*'s holding in favor of voluntary patients' due-process rights remains good law.").

Although the Sixth Circuit has not yet resolved this precise issue in a published decision, every sign strongly indicates that the Court would follow the unanimous path taken by its sister circuits when and if the question is presented. A panel of the Court did address it in an unpublished case, *Higgs v. Latham*, No.91-5273, 1991 U.S. App. LEXIS 25549 (6th Cir. Oct. 24, 1991). The Court held there that *DeShaney* limits substantive due process rights under *Youngberg* to those patients who have been involuntarily confined by the state; the court accordingly dismissed the plaintiff's due process objections to the conditions of her custody for failure to state a claim. *See id.* at *7-9, *15. The Court of Appeals expressly rejected the contrary rulings in *Society for Good Will* and *Parwatikar*, explaining that they "ignore[ed] the distinction between patients voluntarily and involuntarily admitted to state institutions." *Id.* at *11.

When this Court denied the Defendants' motion to dismiss and entered its remedial orders in the early 1990s, *Higgs* was unavailable as precedent because Sixth Circuit Rules generally forbade the citation of unpublished opinions in any court within the circuit. The Rule instructed that " '[c]itation of unpublished decisions … is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case.' " *United States v. Williams*, 15 F.3d 1356, 1362 n.6 (6th Cir. 1994) (*en banc*) (quoting then Sixth Circuit Rule 24(c)); *see also Higgs v. Latham*, 1991 U.S. App. LEXIS 25549, at *1 (setting forth disclaimer of unpublished decision); *see also Wrenn v. Gould*, 808 F.2d 493, 499 n.4 (6th Cir. 1987) ("*Wernert* is an unpublished per curiam opinion and should not have been cited as precedent by plaintiff.").

However, the Sixth Circuit has repealed former Rule 24(c), and now expressly provides that unpublished decisions such as *Higgs* may be cited. *See* Sixth Circuit Rule 28(e) (2008); *see also* FED. R. APP. P. 32.1.

More generally, the holding in *Higgs* is supported by other, more recent Sixth Circuit decisions rejecting substantive due process claims arising outside the context of a state mental health institution where the plaintiff was not involuntarily in the custody of the state. In *Jackson v. Schultz*, 429 F.3d 586 (6th Cir. 2005), the Court of Appeals reversed a district court order denying qualified immunity, and remanded with instructions to dismiss a substantive due process claim against city EMTs because plaintiff's decedent was not involuntarily in state custody. The Court explained: "The overarching prerequisite for custody is an affirmative act by the state that restrains the ability of an individual to act on his own behalf …. There is no allegation that the decedent was not free to leave the ambulance or be removed from the ambulance. Decedent's liberty was 'constrained' by his incapacity, and his incapacity was in no way caused by the defendants." *Id*. at 590-91. *See also Baker v. Detroit*, No. 05-2269, 2007 U.S. App. LEXIS 3885 at **9-10 (6th Cir. Feb. 16, 2007), (dismissing claim under *Youngberg* and *DeShaney* because plaintiff's decedent, a patient being transported in an ambulance to the hospital by city EMTs, "voluntarily called 911" and "voluntarily went with [the EMTs] to the ambulance").

The Sixth Circuit recently took note of, but did not "decide whether the State owes the same affirmative constitutional duties of care and protection to its voluntarily admitted residents as it owes to its involuntarily committed residents under *Youngberg*." *Lanman v. Hinson*, 529 F.3d 673, 682 n.1 (6th Cir. 2008).[4] In dicta, the Court acknowledged the unpublished Sixth

[4] The case concerned a voluntarily admitted mental patient who lost consciousness and stopped breathing while being restrained after he attacked a staff person at a mental institution. On interlocutory appeal, the Sixth Circuit held that "the appropriate source for Lanman's excessive force claim is the Fourteenth Amendment, which provides him, as a patient of a state care institution, with the constitutional right recognized in *Youngberg* to

Circuit decision in *Higgs v. Latham* holding that where "the plaintiff had been voluntarily admitted to the state mental hospital, the State's constitutional duty to protect those it renders helpless…[wa]s not triggered." *Id*. The *Lanman* court also suggested that the circuits are split on this issue. *See id*. In this regard, the Court's dicta is demonstrably mistaken. The Court correctly cited *Torisky v. Schweiker*, 446 F.3d 438, 446-47 (3rd Cir. 2006), *Walton v. Alexander*, 44 F.3d 1297, 1303-04 (5th Cir. 1995) (en banc), and *Monahan v. Dorchester Counseling Ctr.*, 961 F.2d 987, 993 (1st Cir. 1992), as holding no substantive due process right arises when the person is voluntarily admitted to the care of the State. However, the only case cited to the contrary was *Society for Good Will to Retarded Children v. Cuomo*, 737 F.2d 1239, 1245-46 (2nd Cir. 1984) (holding that *Youngberg*'s protection apply to voluntary and involuntary residents alike). The *Lanman* Court failed to recognize that, as noted above, the Second Circuit subsequently held that "the reach of *Society for Good Will* is controlled by the Supreme Court's subsequent holding in" *DeShaney*. *Brooks v. Giuliani*, 84 F.3d 1454, 1466 (2nd Cir. 1996). In the wake of *DeShaney*, the Second Circuit recognized that "the involuntary nature of the commitment was determinative." *Id*. Noting that "Plaintiffs here are under no state-imposed restraint," *id.*, the Second Circuit vacated an injunction "premised on a duty to 'exercise professional judgment' under *Youngberg* and *Society for Good Will*, because there is no such duty here." *Id*. at 1467; *see also Suffolk Parents of Handicapped Adult*, 101 F.3d at 822-24 (same).

---

freedom from undue bodily restraint in the course of his treatment." *Lanman*, 529 F.3d at 681. The Court held that *DeShaney* did not address this situation because plaintiffs' decedent had been deprived of liberty by State officials when he was physically restrained; the Court explained that "the Due Process Clause would protect a voluntarily confined individual from deprivations of liberty by state actors that exceed those authorized by his consent to treatment." *Id*. at 682-83. Because the affirmative acts of State actors physically restrained plaintiff's decedent, the court held that his "status as voluntary or involuntary is irrelevant as to his constitutional right to be free from the State depriving him of liberty without due process." *Id*. at 682 n.1.

In sum, the law addressing the question whether voluntarily admitted patients at a state run mental health institution have substantive due process rights is now settled. While a circuit split existed on the question at the time this Court found the State liable and imposed injunctive relief, every Circuit to consider the question in a published opinion, as well as an unpublished decision from the Sixth Circuit, have now uniformly concluded that voluntarily admitted patients have no such right. What is more, there can be no dispute that the remaining residents of ADC are there voluntarily, and thus are not subject to any State restraint on their liberty. TENN. CODE ANN. § 33-5-303 mandates that the superintendent *must* discharge any individual who so requests (or whose parent or guardian so requests) within 12 hours after receipt of the request or at the time stated in the request, whichever is later. Simply stated, *no* resident of ADC is held there against his or her will, and all have an absolute right to leave any time they please. And of course, the "at risk" members of the Plaintiff class live in the community free of all State restraint on their liberty. The upshot is that the law has changed and clarified such that the wide-ranging federal injunctive relief entered against the State no longer vindicates a federal constitutional right. In these circumstances, as we next explain, the injunctive decree must be vacated.

II. A JUDGMENT CONTROLLING THE OPERATION OF A STATE PROGRAM SHOULD BE VACATED WHEN ITS BASIS IS UNDERMINED BY INTERVENING CLARIFICATION OF THE LAW.

Because the authority of the federal courts is limited to the vindication and enforcement of federal law, "modification of a consent decree may be warranted when the statutory or decisional law has changed to make legal what the decree was designed to prevent." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 388 (1992). This is necessarily so, for "[t]he law changes and clarifies itself over time. Neither the doctrine of *res judicata* … nor a proper respect

for previously entered judgments requires that old injunctions remain in effect when the old law on which they were based has changed." *Sweeton v. Brown,* 27 F.3d 1162, 1166-67 (6th Cir. 1994) (en banc). Thus, "[a] court errs when it refuses to modify an injunction or consent decree in light of changes" in decisional law. *Agostini v. Felton*, 521 U.S. 203, 215 (1997).[5]

The Supreme Court has emphasized that federal injunctive decrees entered in "institutional reform litigation" like this one are particularly susceptible to modification in motions filed pursuant to FED. R. CIV. P. 60(b) "because such decrees 'reach beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions.' " *Rufo*, 502 U.S. at 381 (quoting *Heath v. De Courcy*, 888 F.2d 1105, 1109 (6th Cir. 1989)). The Supreme Court has reaffirmed these principles more recently, unanimously instructing that "[t]he federal court *must* exercise its equitable powers to ensure that when the objects of the decree have been attained, responsibility for discharging the State's obligations is returned promptly to the State and its officials." *Frew v. Hawkins*, 540 U.S. 431, 442 (2004) (emphasis added). The Court emphasized that the district court must "presume[]" that the responsible state officials "have a high degree of competence in deciding how best to discharge their governmental responsibilities," subject only to the court's duty to ensure that the State complies with its "basic obligations of federal law …." *Id.*

In accordance with these principles, the Sixth Circuit has held *en banc* that enforcement of an injunctive decree requires a present "basis in federal law." *Sweeton*, 27 F.3d at 1166. A federal court may not " 'require a unit of state or local government to abide by a consent decree that does not serve any federal interest' " due to a change in the governing law. *Id.* (citation

[5] As *Agostini* makes clear, the standard for modification or vacatur is the same regardless of whether the injunction was originally litigated (as in *Agostini*) or entered by consent (as in *Rufo*). Thus, there is no need for the Court to categorize the relief in this case (in which the question of liability was litigated whereas most of the remedial decrees, including the Remedial Order, have been entered by agreement).

omitted). In such circumstances, the Sixth Circuit held, "[t]he foundation upon which the claim for injunctive relief was built has crumbled." *Id*. Where the "decisional law has changed so that the enjoined behavior, which once *might* have been a violation of federal law, is no longer a matter of federal law at all," the injunctive decree must be vacated. *Id.* (emphasis in original).

The case for vacating a consent decree is even more compelling where the intervening change or clarification in the law reveals that the district court's endorsement of the parties' original settlement was based on a misunderstanding of the parties' legal rights. "A decision changing or clarifying the law will provide a basis for a modification if it demonstrates that the parties 'based their agreement on a misunderstanding of the governing law.' " *Id*. at 1164 (quoting *Rufo*, 502 U.S. at 390). In *Sweeton*, an earlier, unpublished opinion of the Sixth Circuit was in tension with later precedent from other circuits. *See id.* at 1165. At the time the plaintiffs filed the case, some courts of appeals had found a federal due process right in comparable circumstances while others had not; consequently "there was considerable confusion in the cases." *Id.* at 1164. The Sixth Circuit therefore found that "[t]he law at that stage of development was unclear." *Id.* at 1164. But, when the defendants moved years later to vacate the decree in *Sweeton*, it had "bec[o]me clear that" plaintiffs had no due process rights—"the legal theory and analysis upon which the consent decree was formulated was erroneous." *Id*.[6]

That is precisely what has taken place in this case. As demonstrated above, at the time this Court held the State liable and entered the Remedial Order, conditions at ADC "*might* have been a violation of federal law," *Sweeton*, 27 F.3d at 1166 (emphasis in original); after all, at the time two Circuits had held that the substantive due process rights recognized in *Youngberg* extended to voluntarily admitted residents of state mental health institutions while two others had

[6] Similarly, in *Doe v. Briley*, 511 F. Supp. 2d 904, 924 (M.D. Tenn. 2007), Judge Trauger of the Middle District of Tennessee vacated a consent decree where later cases "constituted a clarification of the law about which the parties to the [original] decree were mistaken."

held to the contrary. Now, however, it is clear that "the enjoined behavior … is no longer a matter of federal law at all." *Id.* As shown above, the federal courts of appeals now uniformly hold that substantive due process rights do not extend to voluntarily admitted residents, and the Sixth Circuit has embraced that position in an unpublished decision.

Although the Sixth Circuit has yet to address the question in a precedential decision, the Supreme Court has squarely held that Rule 60(b) relief is available even in cases where existing binding precedent is *adverse* to the State—provided it appears that the law may be changed in the course of litigating the Rule 60(b) motion itself. In *Agostini*, the injunction had been imposed against the New York City school system pursuant to an earlier decision by the Supreme Court itself in the same case holding that the challenged program violated the Establishment Clause. 521 U.S. at 212. In the years that followed, however, Establishment Clause jurisprudence evolved in manner that suggested that its earlier holding might no longer be good law. The defendants accordingly filed a Rule 60(b) motion, which the lower courts were obliged to deny because the Supreme Court had yet to overrule its earlier decision. *Id*. at 214.

The Supreme Court reversed, concluding its prior decision was in error. The Court rejected the objection that Rule 60(b)(5) may be used only "as a means of *recognizing* changes in the law," but not "as a vehicle for *effecting* them." *Id*. at 238 (emphasis in original). The Court explained that "a party's request under Rule 60(b)(5) to vacate a continuing injunction entered some years ago in light of a *bona fide*, significant change in subsequent law" must be considered even where then-existing binding precedent was *against* the movant. *Id*. at 238-39. *A fortiori*, where, as here, all existing precedent *supports* the movant, the fact that the relevant Court of Appeals has yet to address the issue in a precedential opinion cannot bar relief under Rule 60(b).

The *Agostini* Court emphasized that the overriding consideration was the continued existence of federal injunctive relief for a violation of federal law that does not exist. "[I]t would be particularly inequitable," the Court held, "for us to bide our time waiting for another case to arise while the city of New York labors under a continuing injunction forcing it to spend millions of dollars" on the program mandated by the injunctive decree "when it could instead be spending that money … [on its preferred] program that is perfectly consistent with the Establishment Clause." *Id*. at 240. The State of Tennessee finds itself in precisely the same position. As described above, the orders entered in this case require the State to spend millions—indeed, tens of millions—of dollars on the provision of myriad services to mentally retarded persons in West Tennessee without regard to whether they have ever set foot in ADC while such services are denied to identically-situated mentally retarded persons in Middle and East Tennessee.

It is now clear that the conditions giving rise to all of this relief did not violate the Constitution, for the residents of ADC – to say nothing of the "at risk" members of the plaintiff class – do not possess the substantive due process rights upon which the relief was based. As Judge Trauger pointed out in similar circumstances: "In light of the fact that no federal right underpins the [original] decree—as well as the fact that the 'local government administrators' in this case appear to favor vacating the decree—the court can identify no reason that the 1974 consent decree should remain in effect." *Doe v. Briley*, 511 F. Supp. 2d at 925. The same conclusion holds in this case.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court vacate the Remedial Order and all other injunctive relief previously entered in this case, and dismiss the case with prejudice.

September 3, 2008

Respectfully submitted,

ROBERT E. COOPER, JR.
Attorney General and Reporter

/s/ Dianne Stamey Dycus
DIANNE STAMEY DYCUS (9654)
Deputy Attorney General
General Civil Division
P.O. Box 20207
Nashville, TN 37202
(615) 741-6420
Dianne.Dycus@ag.tn.gov

/s/ Charles J. Cooper
CHARLES J. COOPER
MICHAEL W. KIRK
BRIAN S. KOUKOUTCHOS
RACHEL CLARK
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600

LEO BEARMAN, JR. (8363)
BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ
165 Madison Avenue, Suite 2000
Memphis, TN 38103
(901) 526-2000

JONATHAN P. LAKEY (16788)
PIETRANGELO COOK, PLC
6410 Poplar Avenue, Suite 190
Memphis, TN 38119
(901) 685-2662

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of September, 2008, a true and exact copy of the foregoing has been forwarded by the Court's Electronic Filing System to:

Jonas Geissler/Amie Murphy, Trial Attorneys
U.S. Department of Justice
Special Litigation Section, Civil Rights Division
601 D Street, NW
Patrick Henry Building, Room 5918
Washington, DC 20004

Judith Gran
Public Interest Law Center of Philadelphia
125 S. 9th Street, Suite 700
Philadelphia, PA 19107

Jack Derryberry
Ward, Derryberry & Thompson
404 James Robertson Parkway, Suite 1720
Nashville, TN 37219

Earle J. Schwarz
The Offices of Earle J. Schwarz
2157 Madison Avenue, Suite 201
Memphis, TN 38104

William Sherman
Attorney at Law
809 N. Palm Street
Little Rock, AR 72205

Nancy Ray, Ed.D.
Court Monitor
NKR & Associates, Inc.
318 Delaware Avenue
Delmar, NY 12054

/s/ Michael W. Kirk